

STATE OF CALIFORNIA
ELECTRICITY OVERSIGHT BOARD



Gray Davis, Governor

January 29, 2002

Ms. Magalie Roman Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

VIA EMAIL

Re: Pacific Gas and electric Company and Etrans, Docket No. ER02-455 et al

Dear Ms. Salas:

Please file the attached electronic version of the Motion to Intervene and Protest of the California Electricity Oversight Board.

Thank you for your assistance.

Sincerely,

/s/

Sidney Mannheim Jubien
Senior Staff Counsel
Electricity Oversight Board

Enclosure

cc: Official Service List of ER02-455 *et al.*

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company and ETrans	Docket No. ER02-455-000
Electric Generation LLC	Docket No. ER02-456-000
Pacific Gas and Electric Company PG&E Corporation On Behalf of its Subsidiaries Electric Generation LLC, ETrans LLC and GTrans LLC	Docket Nos. EC02-31-000 EL02-36-000 CP02-38-000 ES02-17-000
Pacific Gas and Electric Company Standard Pacific Gas Line Incorporated GTrans LLC PG&E Gas Transmission, Northwest Corporation	Docket No. CP02-39-000 Docket No. CP02-40-000 Docket No. CP02-41-000 Docket No. CP02-42-000
Pacific Gas and Electric Company et al.	Project Nos. 77-116, 96-031, 137-031, 175-018, 178-015, 233-082, 606-020, 619-095, 803-055, 1061-056, 1121-058, 1333-037, 1354-029, 1403-042, 1962-039, 1988-030, 2105-087, 2106-039, 2107-012, 2130-030, 2155-022, 2310-120, 2467-016, 2661-016, 2687-022, 2735-071 Project Nos. 233-081, 1354-005, 2107-010, 2661-012, 2687-014 Project Nos. 2118-006, 2281-005, 2479-003, 2678-001, 2781-004, 2784-001, 4851-004, 5536-001, 5828-003, 7009-004, 10821-002

**MOTION TO INTERVENE AND PROTEST
OF THE
CALIFORNIA ELECTRICITY OVERSIGHT BOARD**

I. INTRODUCTION

Pursuant to Commission Rules of Practice and Procedure, 18 C.F.R. §§ 385.214(a)(3) and (b), the California Electricity Oversight Board (Board) hereby moves to intervene in the above-captioned docket. The California Electricity Oversight Board (“CEOB”) was created as a component of California’s comprehensive restructuring legislation. The Board’s statutory responsibilities include oversight of the California Independent System Operator Corporation (CAISO), the energy and ancillary services markets administered by the CAISO, and the reliability of the California electric grid. In addition, the Board has an ongoing responsibility on behalf of the State of California to ensure that wholesale electricity markets deliver the promised benefits of lower prices and higher quality services while ensuring reliability.

The principal office of the Board is located at 770 L Street, Suite 1250, Sacramento, California, 95814.

All pleadings, orders, correspondence and communications regarding this motion should be directed to the following persons:

Erik Saltmarsh
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
Tel: (916) 322-8601
Fax: (916) 322-8591

Sidney Mannheim Jubien
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
Tel: (916) 322-8601
Fax: (916) 322-8591

II. MOTION TO INTERVENE

On November 30, 2001, Pacific Gas and Electric Company (“PG&E”) submitted a voluminous and complex series of filings (“November 30 Filings”) before the Commission under Sections 8 (transfer of licenses to operate hydroelectric facilities), 203

(transfer of assets) and 205 (tariff rate filing) of the Federal Power Act as part of the implementation of PG&E's proposed Plan of Reorganization under Chapter 11 of the Bankruptcy Code ("Plan"). The Plan was jointly filed by PG&E and PG&E Corporation ("Parent") with the Bankruptcy Court on September 20, 2001. The Plan would disaggregate PG&E's operations into several separate intermediate holding companies organized as limited liability companies (LLCs). ETrans would own and operate the electric transmission system; GTrans would own and operate the gas transmission system; and Electric Generation LLC (Gen) would operate and maintain the generation facilities currently owned by PG&E. These three new companies would be affiliated with one another under the Parent but would not be affiliated with reorganized PG&E, which would become a gas and electric distribution only utility.

The Plan further calls for the creation of 26 separate LLCs which would be wholly owned subsidiaries of Gen. Each subsidiary LLC would own and hold the license of one of 26 hydroelectric projects currently owned by PG&E. Each subsidiary LLC would lease the project to Gen, which would be responsible for operating, maintaining and managing the 26 projects. Gen would enter into a 12-year contract with PG&E (the distribution utility) at an average cost of \$50 per MWh.

The Board is just one of several California State parties that have an interest in these proceedings. The California Public Utilities Commission (CPUC) will, among other things, address the jurisdictional issues associated with PG&E's Plan, which would, if approved, substantially limit the State's jurisdiction in ways that are inconsistent with the public interest, in general, and the Federal Power Act, in particular. The California Resources Agency will, among other things, address the environmental risks associated

with the Plan. In these proceedings, the Board intends to focus primarily on the risk to California's electricity consumers of PG&E's proposed Plan, thereby complementing the positions of the CPUC and other California State parties in these proceedings.

Accordingly, the Board moves to intervene to obtain party status.

The Board's participation in this proceeding is in the public interest of the citizens of the State of California and the Board has an interest that may be directly affected by the outcome of these proceedings. 18 C.F.R. §§ 385.214(b)(2)(ii) and (iii). The Board respectfully requests that the Commission grant this motion to intervene.

III. PROTEST

Under Section 203 of the Federal Power Act, the Commission must find that the transfer of assets is in the public interest. The Plan is not in the public interest and, therefore, the Commission should dismiss the November 30 filings.

A. Thinly Capitalized Single-Asset LLCs are Not in the Public Interest

The Board has become increasingly concerned over the trend in the electric (and gas) industry of the proliferation of minimally capitalized single asset LLCs. It is very nearly the case that, except for resources owned by traditional investor-owned utilities, each generation facility in California (and the rest of the nation) is owned by an LLC as its sole asset. Typically, each generation LLC enters into an output contract with a (possibly affiliated) marketer who then sells the output to other traders and/or a load serving entity. The marketer itself is likely to be an LLC whose sole asset is the right to market the output of one of the single asset generation LLCs. All of the LLCs are thinly capitalized and even the generation-owning LLCs are likely to be highly leveraged. When profitable the LLC will quickly funnel cash up to the parent; in the event the LLC

becomes unprofitable, it may simply stop performing, leaving customers without the benefit of their bargain.

Enron's bankruptcy presents a case in point. Enron Energy Services entered into a long-term retail direct access contract with the University of California and the California State University System to serve the state's campuses. In February 2001, having found the contract to be unprofitable, Enron simply attempted to break the contract and the Universities had to sue Enron for enforcement.¹ Although the court ordered Enron to perform, now that Enron Corp. has declared bankruptcy, its subsidiaries may become unable to perform leaving little of value to satisfy damages claims. The City of Roseville, California, which operates as a municipal utility, has also entered into contracts with Enron. In the summer of 2000, Enron and Roseville entered into a 5-year contract at \$49 per MWh. This contract may also be in jeopardy.

Although no Enron subsidiary is involved, the State of California (through the Department Water Resources) has entered into long-term contracts with single asset LLCs. Typically, these contracts are structured over several years (some as many as 20) and require the State to pay for energy at a higher rate during the first half the contract. Thus, the benefit of lower on-average energy prices can only be achieved if the contract is fully performed. Thinly capitalized LLCs are designed to minimize risk to investors and to protect assets owned by affiliates in the event any particular LLC becomes insolvent. Accordingly, if the economics of a particular deal render a contract unprofitable to the LLC, the LLC can simply file for bankruptcy at little risk to itself. Put another way, in dealing with an LLC in today's environment, the buyer is really bearing a disproportionate amount of the downside risk. If contract requires the buyer to pay \$50

MWh of electricity for ten years and the market prices falls, the buyer is stuck with an overpriced contract. If the price of electricity rises to, say \$200 MWh, then buyer may be stuck with a worthless contract because it is more economic for the seller to default than to perform under the contract. The buyer is without a remedy to satisfy a judgment because the thinly capitalized LLC has no hard assets or only highly leveraged assets and its affiliates and parent are unreachable.

B. The Holding-Company Structure PG&E Proposes is Not in the Public Interest

The Plan is not PG&E's first effort at "ring-fencing." In *PG&E Energy National Energy Group*, 94 FERC ¶ 62,031 (2201, *reh. den.*, 94 FERC ¶ 61,154 (2001) the Commission approved the creation of new intermediate holding companies and subsidiaries to protect PG&E Parent's merchant generation facilities from creditors of PG&E the utility. The purpose of this earlier restructuring was to keep creditors of the bankrupt utility away from the assets of PG&E's other enterprises.

The new Plan creates another set of intermediate holding companies that would stand between the operating companies and the Parent. PG&E's proposed structure looks more and more like the holding company "pyramiding" structures of the 1930s that led to enactment of the Public Utility Holding Company Act of 1935 (PUHCA).² The pyramid structure, with small, highly leveraged operating companies separated from the holding company parent with multiple layers of intermediate holding companies, allows profits to be funneled up to the parent.³ When the operating companies are not profitable, the

¹ "Enron Ordered to Honor Contract with California Universities," Sciencetech, IssueAlert, April 13, 2001.

² "Public Utility Holding Company Act of 1935: 1935-1992," Energy Information Administration, DOE/EIA-0563 at 2.

³ *Id.*

whole structure, like a house of cards, is in danger of collapsing. Again, Enron is a case in point.

III. CONCLUSION

PG&E's November 30, 2001 filings propose to take 26 environmentally sensitive hydroelectric projects which have been owned and operated to the mutual benefit of ratepayers and shareholders and to the benefit of the public at large (PG&E has, generally, exhibited admirable stewardship of land located in and around its hydroelectric facilities), and place them in virtually unregulated LLCs. The only protection the Plan offers ratepayers is a 12-year contract between Gen (which will not own any of the assets) and PG&E the distribution utility, which may, or may not, be worth the paper it's written on.

While the Commission may not be in a position to reverse the trend toward the multiplication of small LLCs with respect to existing merchant generators and their marketing affiliates, the Commission is in a position to halt this trend by denying PG&E's various applications to further disaggregate its assets into numerous LLCs. The ratepayers and consumers of the State of California deserve reliable and affordable electricity, which can best be achieved by prohibiting any further disaggregation of utility-owned generation. Accordingly, the Board urges the Commission to reject PG&E's filings as what PG&E proposes is not in the public interest.

Dated: January 29, 2002

Respectfully submitted,

Sidney Mannheim Jubien

Erik N. Saltmarsh, Chief Counsel
Sidney Mannheim Jubien, Staff Counsel
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
(916) 322-8601

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary for this proceeding on January 29, 2001, pursuant to Rule 2010(a) of the Commission's Rules of Practice and Procedure.

Dated at Sacramento, California, this 29th day of January, 2001.

/s/

Larry Cook
Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
(916) 322-8601